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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NANCY MARIE BESENTY, Defendant and Appellant.	B275222 (Los Angeles County Super. Ct. No. TA115853-03)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Reversed and remanded.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra and Rob Bonta, Attorneys General, Gerald A. Engler and Lance E. Winters, Chief Assistant Attorneys General, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Idan Ivri and Rene

Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Nancy Marie Besenty appeals the sentence imposed at her resentencing hearing following the grant of her petition for habeas corpus pursuant to *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). The issue before us is whether Besenty may challenge her convictions for murder and attempted murder pursuant to Senate Bill No. 775 (Stats. 2021, ch. 551, § 2) (Senate Bill 775) and Penal Code section 1170.95, subdivision (g),[1] which permits "[a] person convicted of murder, attempted murder, or manslaughter whose conviction is not final [to] challenge on direct appeal the validity of that conviction. . . ."[2]

We hold that section 1170.95, subdivision (g) applies to Besenty's case. We reverse and remand to the trial court to permit the People to elect to retry the charges and allegations or, if the People do not elect to retry the case, to proceed with resentencing Besenty in conformance with section 1170.95.

FACTS AND PROCEDURAL HISTORY

Facts

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

[2] In light of our disposition, we need not address Besenty's other contentions and do not recount them here.

Carlos Quintanilla was a member of the 18th Street gang. His sister Yesenia Quintanilla claimed the Los Players clique, but she was not actually an 18th street gang member. Around 10:00 p.m. on November 25, 2010, Carlos's girlfriend, Cindy Sanchez, drove the Quintanillas to the house of 18th Street gang member Ada Zeledon to confront Zeledon because she had accused Yesenia of prostitution and "jumped" the Quintanillas' sister. Zeledon came outside and argued with Yesenia. Carlos tried to hit Zeledon with a bottle. Both Carlos and Yesenia challenged Zeledon to fight, but she refused. Zeledon called "Mala" and Francisco Lozano, who were also 18th Street gang members, for help. The Quintanillas left when Zeledon's mother came outside.

Sanchez then drove the Quintanillas to another location within 18th Street gang territory to look for Lozano, who Carlos knew to be a "shot caller" for the Los Gangsters clique. The Quintanillas spotted Lozano, who was standing in front of an apartment gate with about 15 other people, and jumped out of the car. Carlos attempted to punch Lozano, but Lozano ducked. Yesenia pepper-sprayed Lozano and yelled profanities at him. They argued over whether Yesenia could continue to claim the gang.

Besenty, who Carlos knew to be a shot caller, walked over and identified herself by the gang moniker "Casper." Besenty and Carlos argued for over an hour. At one point in the argument, Besenty punched Carlos in the face. Besenty told Carlos, "Man, you know you talking to the main head?" She took out her cell phone and called Yesenia Escobar, known as "Shorty," and told her to come over. Besenty then gave Lozano "a look." Lozano warned the Quintanillas to "watch tomorrow"

several times and said that he was going to get them. The Quintanillas returned to Sanchez's car and drove back to Yesenia's apartment.

Zeledon called Lozano the next day. She was upset that the Quintanillas "disrespected" her house and family. Lozano told Zeledon that Yesenia pepper-sprayed him. They both wanted to beat up Yesenia.

Later that night, Besenty drove Zeledon, Mala, and Lozano to Yesenia's apartment. Escobar also drove to the apartment with Patricia Acosta and Patricia Ortiz. Zeledon, Lozano, and Mala got out of Besenty's car and jumped over the apartment complex gate. Escobar and Acosta followed. Besenty and Ortiz remained in the vehicles.

Escobar and Acosta knocked on the apartment door and were able to get Carlos to come outside. Yesenia refused to leave the apartment. When Carlos stepped outside, he saw Lozano pulling up the hood of his jacket. Afraid of what Lozano might do, Carlos tried to turn around to go back inside the apartment, but Escobar pepper-sprayed him. Mala grabbed Carlos by the shirt. Mala, Zeledon, and Acosta beat Carlos. Sanchez could hear him struggling and screaming. Carlos tried to go back into the apartment but Zeledon held his shirt collar and punched him. Yesenia tried unsuccessfully to pull Carlos back into her apartment. Lozano pulled out a gun wrapped in a sock and shot Carlos in the head. Carlos collapsed. Acosta, Mala, and Zeledon fled, jumping over the fence.

Sanchez heard Yesenia yelling and heard a gunshot. She saw Lozano point a sock-covered gun at Yesenia and shoot her in the head. Yesenia fell to the floor and managed to get into the bathroom.

Lozano walked into the bedroom where Sanchez was hiding and aimed the gun at Sanchez's head, but then left without explanation. Lozano, Zeledon, and Mala ran to Besenty's car, and Besenty drove them to her house.

Yesenia died a few days later as a result of the gunshot wound to her head. Carlos survived, but lost hearing in one ear, and suffered lasting speech and memory impairment.

Trial and First Appeal

The prosecution tried the case on two theories of liability for murder and attempted murder: (1) direct aiding and abetting; and (2) aiding and abetting assault by means of force likely to produce great bodily injury under the natural and probable consequences doctrine.

The jury found Besenty guilty of first degree murder (§ 187, subd. (a) [count 1]) and attempted willful, deliberate, and premeditated murder (§§ 664 & 187, subd. (a) [count 2]). As to both counts, the jury also found the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)), and that a principal personally and intentionally discharged a firearm, causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1)).

The trial court sentenced Besenty to 50 years to life in prison in count 1, comprised of 25 years to life for murder and 25 years to life for the firearm enhancement. As to count 2, Besenty was sentenced to life in prison, plus a consecutive 25 years to life for the firearm enhancement.

We affirmed the convictions on May 9, 2013. (*People v. Besenty* (May 9, 2013, B237699) [nonpub. opn.] (*Besenty I*).) The Supreme Court denied review on July 31, 2013.

Petition For Habeas Corpus and Resentencing

On September 12, 2014, Besenty filed her petition for habeas corpus pursuant to *Chiu*, *supra*, 59 Cal.4th 155, with the Supreme Court. *Chiu* held that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Id*. at pp. 158–159.) The Supreme Court issued an order to show cause returnable to the Superior Court. The Superior Court ordered the People to file a return and Besenty to file a traverse.

The prosecutor conceded that Besenty was entitled to have her first degree murder conviction reduced to second degree murder. At the resentencing hearing, the Superior Court reduced Besenty's first degree murder conviction to murder in the second degree. The court also reduced Besenty's attempted premeditated murder conviction to "second degree attempted murder."[3]

The court sentenced Besenty to 15 years to life in prison for the murder, plus 25 years to life for the gang-related gun enhancement (§12022.53, subds. (d) & (e)(1)); and a consecutive

[3] The offense of "second degree attempted murder" does not exist; unlike murder, attempted murder is not divided into degrees. (See *People v. Favor* (2012) 54 Cal.4th 868, 876.)

term of life in prison for the attempted murder,[4] plus 25 years to life for the gang-related gun enhancement (§12022.53, subds. (d) & (e)(1)) attached to that count; plus two 1-year prison terms pursuant to section 667.5, subdivision (b).

Appeal From Resentencing

On appeal from resentencing on September 18, 2017, we modified the sentence by striking the section 667.5, subdivision (b) enhancements, but otherwise affirmed the judgment. (*People v. Besenty* (Sept. 18, 2017, B275222) [nonpub. opn.] (*Besenty II*).)

The Supreme Court granted review to determine whether the jury was required to find that premeditated attempted murder was a natural and probable consequence of assault by means of force likely to produce great bodily injury before it could convict Besenty of attempted premeditated murder as an aider and abettor under the natural and probable consequences doctrine. The court deferred briefing pending consideration and disposition of the issue in *People v. Mateo*, S232674 (*Mateo*) or further order. (S244887, Dec. 20, 2017.)

After Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1(f), p. 6674 (Senate Bill 1437)) went into effect on January 1, 2019, the Supreme Court transferred *Mateo* back to Division Four of the Court of Appeal, Second Appellate District. On April 10, 2019, the Supreme Court transferred the instant matter back to this court with directions to vacate our decision and reconsider the

[4] A term of life in prison is the appropriate sentence for attempted premeditated murder. (§ 664, subd. (a).)

cause in light of Senate Bill 1437 and Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, p. 5106 (Senate Bill 620)).

We vacated our September 18, 2017 opinion and issued a revised opinion, which modified the sentence by striking the two 1-year section 667.5, subdivision (b) enhancements, and remanded the cause to the trial court for the limited purpose of determining whether to exercise its discretion to strike the firearm enhancements imposed under section 12022.53, subdivisions (d) and (e)(1) pursuant to the amendments made to Senate Bill 620. (*People v. Besenty* (Nov. 15, 2019, B275222) [nonpub. opn.] (*Besenty III*).) With respect to Senate Bill 1437, we held that Besenty's sole avenue for relief was to file a post-judgment petition pursuant to section 1170.95. (*Id.*) We affirmed the trial court's judgment in all other respects. (*Id.*)

The Supreme Court again granted review on February 11, 2020. Because Besenty contended that Senate Bill 1437 applied to the crime of attempted murder, her case was held for *People v. Lopez*, case number S258175 (*Lopez*), which was considering that question. While *Lopez* was pending, the Legislature passed Senate Bill 775. The legislation amended section 1170.95 to extend relief to certain attempted murder convictions and permit section 1170.95 review on direct appeal. On February 16, 2022, the Supreme Court transferred the matter back to this court with directions to vacate our decision and reconsider the cause in light of Senate Bill 775.

We vacated our November 15, 2019 opinion, and now issue this opinion, addressing Besenty's contention that she is entitled to vacatur of her convictions for murder and attempted murder and resentencing pursuant to Senate Bill 775 and section 1170.95, subdivision (g).

DISCUSSION

Senate Bills 1437 and 775

Senate Bill 1437, which became effective on January 1, 2019, was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f).) The legislation "add[ed] . . . section 1170.95 [to the Penal Code], which allows those 'convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced . . . .' (§ 1170.95, subd. (a).)" (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

On December 17, 2020, our Supreme Court rejected a defendant's argument that the ameliorative provisions of Senate Bill 1437 were retroactively applicable to cases still pending on appeal under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). (*People v. Gentile* (2020) 10 Cal.5th 830, 851–852.) *Gentile* explained that, under *Estrada*: "Newly enacted legislation lessening criminal punishment or reducing criminal liability presumptively applies to all cases not yet final on appeal at the time of the legislation's effective date. [Citation.] This presumption 'rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as

possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.] [¶] However, when ameliorative legislation sets out a specific mechanism as the exclusive avenue for retroactive relief, we have held that such legislation does not apply retroactively to nonfinal judgments on direct appeal. [Citations.]" (*Id*. at p. 852.) *Gentile* reasoned that the Legislature must have intended for the petitioning process set forth in section 1170.95 to be the exclusive mechanism for obtaining relief because section 1170.95 contained a specific procedure for seeking retroactive relief and permitted the parties to offer evidence outside of the original record, a step that is unavailable on direct appeal. (*Id*. at pp. 853–854.) The *Gentile* court held that "the ameliorative provisions of Senate Bill 1437 do not automatically apply to nonfinal judgments on direct appeal." (*Id*. at p. 859.)

In 2021, the Legislature responded to *Gentile* and other decisions of the California courts by promulgating Senate Bill 775, which became effective on January 1, 2022. (See Assem. Com. on Public Safety, Analysis of Senate Bill 775 as amended July 6, 2021, p. 11; Stats. 2021, ch. 551, § 1; *People v. Glukhoy* (2022) 77 Cal.App.5th 576, 591 (*Glukhoy*).) An analysis by the Assembly Public Safety Committee explained: "'In *Gentile*, the California Supreme Court found that the petition process set forth in Penal Code section 1170.95 is the exclusive remedy for retroactive S[enate] B[ill] 1437 relief on nonfinal judgments. [Citation.] Generally, the rule is that a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citation.] [¶] This bill would provide that where a conviction is not final, it may be challenged on S[enate] B[ill] 1437 grounds on direct appeal from that

conviction.' [Citation.]" (*Glukhoy*, *supra*, at p. 591, fn. 34.) The legislation amended section 1170.95 to provide: "[a] person convicted of murder, attempted murder, or manslaughter *whose conviction is not final* may challenge *on direct appeal* the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)." (§ 1170.95, subd. (g), italics added.) Senate Bill 775 also clarified "that persons who were convicted of attempted murder . . . under . . . the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theor[y]." (Stats. 2021, ch. 551, § 1; § 1170.95, subd. (a).)

Applicability of Section 1170.95, Subdivision (g)

The parties disagree as to whether Besenty may challenge her murder and attempted murder convictions pursuant to section 1170.95, subdivision (g), on appeal from resentencing following a grant of habeas corpus under *Chiu*, *supra*, 59 Cal.4th 155. Specifically, they disagree whether Besenty's challenges are to convictions that are not final and on direct appeal within the meaning of section 1170.95, subdivision (g). The parties agree that if section 1170.95, subdivision (g) applies, Besenty's convictions must be reversed and the matter remanded to permit the People to retry the charges and allegations or, if the People do not elect to retry the case, for the trial court to resentence Besenty under section 1170.95. We hold that section 1170.95, subdivision (g) applies in Besenty's case. We reverse the convictions and remand to the trial court to permit the People to elect to retry the charges and allegations or, if the People do not

elect to retry the case, to proceed with resentencing Besenty in conformance with section 1170.95.[5]

Besenty's Convictions Are Not Final

The People argue that the habeas relief Besenty obtained under *Chiu* did not affect the finality of her convictions within the meaning of section 1170.95, subdivision (g), which the People define as "a trier of fact's guilty verdict or the defendant's admission of guilt via a plea, not the sentence or judgment later judicially imposed." We disagree. The result of the habeas proceedings in this case was that the trier of fact's guilty verdicts were vacated, and replaced with new convictions.

In *Chiu*, our Supreme Court held that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th at pp. 158–159.) If a jury has been instructed under the invalid natural and probable consequences doctrine as well as under valid principles of direct aiding and abetting, the error is only harmless if "we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Id*. at p. 167.) Where the error cannot be deemed harmless, the first

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[5] Besenty argues that there were two instructional errors: (1) the instructions permitted the jury to find Besenty guilty of murder under the natural and probable consequences theory of aiding and abetting, and (2) the direct aiding and abetting instructions permitted the jury to find Besenty guilty of murder by imputing the killer's implied malice to her. As we reverse on the basis of the first error, we do not address the second purported error.

degree murder conviction must be reversed. (*Id*. at p. 168.) The prosecution may accept a reduction of the conviction to second degree murder or seek a first degree murder conviction under a valid theory. (*Ibid*.) *Chiu* did not address attempted premeditated murder.

In this case, the prosecution conceded *Chiu* error. At the hearing, the trial court inquired, "As to count 2 for attempted -- it would have to be attempted second-degree murder -- wouldn't it?", and the prosecutor replied "Yes." (*Besenty II*, *supra*, B275222.) The trial court then reversed the murder conviction and the attempted premeditated murder conviction, and resentenced Besenty in both counts.

The trial court's reversal of the attempted premeditated murder conviction, and its imposition of a conviction for second degree attempted murder, was likely error; at that time, the courts had applied *Chiu* to reduce only first degree murder convictions, and "second degree attempted murder" did not (and does not) exist as an offense. Regardless, the attempted premeditated murder conviction was vacated. On appeal from resentencing, the Attorney General did not challenge the trial court's ruling that vacated the original conviction for attempted premeditated murder, or its reduction to second degree attempted murder, and we did not reverse the trial court with respect to that count.[6] By the time that Besenty petitioned the

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[6] In *Besenty II*, we observed in a footnote that attempted murder is not divided into degrees, and that there is therefore no crime of attempted second degree murder. (*Besenty II*, *supra*, B275222.) We explained that the effect of a finding that an attempted murder was willful, deliberate, and premeditated was to increase the punishment from a determinate term of five,

Supreme Court for review, the Supreme Court was considering the question of whether *Chiu* might also apply to attempted premeditated murder. Although the Supreme Court did not ultimately resolve whether *Chiu* applies in the context of attempted premeditated murder, the question of whether a person can be convicted of attempted premeditated murder as an aider and abettor under the natural and probable consequences doctrine has remained a live issue throughout Besenty's appeal.

As a result of the habeas proceedings, neither Besenty's murder conviction nor her attempted premeditated murder conviction can be considered final. When a defendant successfully argues, as Besenty did, that they were tried under both a valid and an invalid theory of liability, and it is impossible to discern the jury's basis for the conviction, the conviction must be reversed. (*People v. Aledamat* (2019) 8 Cal.5th 1, 9 (*Aledamat*).) The prosecution may retry the greater offense as if a conviction had never existed. Although the prosecutor opted not to retry the charges against Besenty, the convictions were nonetheless reversed and are therefore not final.

We note that our conclusion that Besenty's convictions were not final for the purposes of section 1170.95, subdivision (g), does not mean that every successful habeas proceeding renders the original trier of fact's murder and attempted murder convictions not final. We need not decide here whether, for

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seven, or nine years, to an indeterminate term of life in prison under section 664, subdivision (a). (*Ibid.*) We stated that, despite its comments, the trial court properly imposed a life sentence that "comported with the jury's finding that the attempted murder was willful, deliberate, and premeditated." (*Ibid.*) We did not hold that the trial court erred or order the abstract of judgment corrected.

example, a habeas proceeding that results in reversal of a conviction on a kidnapping count and resentencing of the defendant, while leaving in place the defendant's convictions for murder and attempted murder, renders those murder convictions not final. The People have argued here that the Legislature intended – by using the word "conviction" and not the words "judgment" or "sentence" in section 1170.95, subdivision (g) – to distinguish nonfinal convictions from nonfinal sentences or judgments. But, in this case the distinction has no effect, as the habeas proceedings resulted in vacating the original convictions themselves, as well as the original sentence and judgment. The procedural history here makes clear that Besenty's convictions for murder and attempted murder are not final.

Besenty's Case is "On Direct Appeal" for Purposes of Section 1170.95, Subdivision (g)

Our Supreme Court recently discussed what it means for a case to be "on direct review," when it addressed the issue of finality for *Estrada* purposes under circumstances analogous to those presented here. In *People v. Padilla* (2022) 13 Cal.5th 152 (*Padilla*), the 16-year-old juvenile defendant was convicted of murder and conspiracy to murder in adult criminal court and sentenced to life without the possibility of parole (LWOP). (*Id*. at p. 159.) After the United States Supreme Court issued *Miller v. Alabama* (2012) 567 U.S. 460, the defendant successfully petitioned for writ of habeas corpus. (*Ibid*.) The trial court vacated his sentence, reconsidered the case in light of *Miller*, and reimposed LWOP. (*Ibid*.) The defendant appealed from resentencing. (*Ibid*.) While his appeal was pending, the United

States Supreme Court decided *Montgomery v. Louisiana* (2016) 577 U.S. 190. (*Ibid.*) The Court of Appeal again vacated his sentence and remanded for resentencing. (*Ibid.*) Before the defendant was resentenced, the voters passed Proposition 57, which required all criminal charges against minors to be filed in juvenile courts. (*Ibid.*) The trial court again resentenced the defendant to LWOP, and the defendant appealed on the basis that Proposition 57 applied to his case retroactively because his appeal was still pending when the legislation was passed. (*Ibid.*) The Court of Appeal agreed that vacatur of the defendant's sentence made his appeal "non-final" such that Proposition 57 applied. (*Ibid.*) The Attorney General petitioned for review. (*Ibid.*)

Our Supreme Court ruled: "A case is final when 'the criminal proceeding as a whole' has ended [citation] and 'the courts can no longer provide a remedy to a defendant on direct review' [citation]. When Padilla's sentence was vacated, the trial court regained the jurisdiction and duty to consider what punishment was appropriate for him, and Padilla regained the right to appeal whatever new sentence was imposed. His judgment thus became nonfinal, and it remains nonfinal in its present posture because the Court of Appeal ordered a second resentencing, from which the Attorney General now appeals." (*Padilla*, *supra*, 13 Cal.5th at p. 161–162.)

The *Padilla* court rejected the Attorney General's argument that the court should distinguish between cases in which the defendant is undergoing retrial or resentencing (no retroactivity) and cases "'not yet final on initial review'" (retroactive). (*Padilla*, *supra*, 13 Cal.5th at p. 162.) The court explained "collateral review is distinct from direct review in that it seeks to unwind a

judgment that has been affirmed on appeal. [Citation.] For that reason, ""an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."" [Citation.] But once a court has determined that a defendant is entitled to resentencing, the result is vacatur of the original sentence, whereupon the trial court may impose any appropriate sentence. [¶] It is clear that Padilla's present appeal from his resentencing is part of direct review of a nonfinal judgment, not collateral review of a final judgment." (*Id.* at p. 163.)

The trial court determined that, like Padilla, Besenty was entitled to resentencing. The court granted Besenty's petition for writ of habeas corpus, vacated her sentence, and imposed a new sentence. Besenty's case is now "on direct appeal" from the trial court's nonfinal judgment within the meaning of section 1170.95, subdivision (g).

The Natural and Probable Consequences Instruction Was Not Harmless

Having determined that section 1170.95, subdivision (g) applies in Besenty's case, we must now decide whether she is entitled to reversal of her convictions. The People concede that she is, and we agree.

It is uncontested that Besenty was tried as an aider and abettor under a valid (direct aiding and abetting) and an invalid (natural and probable consequences aiding and abetting) theory of liability for murder. Under such circumstances, "[t]he reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error

was harmless beyond a reasonable doubt." (*Aledamat*, *supra*, 8 Cal.5th at p. 13.) The prosecution conceded on habeas corpus that the jury may have relied on the instruction on the natural and probable consequences theory of aiding and abetting; inclusion of the instruction could not have been harmless beyond a reasonable doubt. Because the error is not harmless, we reverse the murder and attempted murder convictions, and remand to the trial court to permit the People to elect to retry the charges and allegations or, if the People do not elect to retry the case, to proceed with resentencing Besenty in conformance with section 1170.95.[7] (See *Chiu*, *supra*, 59 Cal.4th at pp. 167–168.)

[7] Besenty requests that we admonish the trial court regarding how to instruct the jury on direct aider and abettor liability in the event of a retrial. We decline. The issue is not before us; any admonishment is premature.

DISPOSITION

The murder and attempted murder convictions are reversed. The matter is remanded to the trial court to permit the People to elect to retry the charges and allegations or, if the People do not elect to retry the case, to proceed with resentencing Besenty in conformance with section 1170.95.

MOOR, J.

I concur:

KIM, J.

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BAKER, Acting P. J., Dissenting

This is an appeal about procedure more than substance. No one disputes defendant and appellant Nancy Besenty would be entitled to file a Penal Code section 1170.95, subdivision (a) petition to vacate her murder and attempted murder convictions. Had she done that, the People may well have conceded she is entitled to relief (at least based on the position taken by the Attorney General in this appeal).

Defendant chose not to do that, however—even after our earlier resolution of this appeal invited her to proceed in exactly that manner. Instead, defendant chose to litigate the meaning of Penal Code section 1170.95, subdivision (g), a provision that permits a "person convicted of murder, attempted murder, or manslaughter whose conviction is not final" to "challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)."

The majority holds this statutory language allows defendant to challenge her convictions in this appeal from her resentencing after obtaining habeas corpus relief. I would not read Penal Code section 1170.95, subdivision (g) so broadly. While I agree defendant's convictions are not final, this is not a

direct appeal—at least as that description is commonly employed by the courts, a point of which the Legislature would have been well aware.[1] (See, e.g., *People v. Gentile* (2020) 10 Cal.5th 830, 841–842, 851; see also *People v. Giordano* (2007) 42 Cal.4th 644, 659.)

I would not reverse and remand this case for retrial. Instead, I would affirm without prejudice to defendant's ability to pursue the uncontested avenue for relief that Penal Code section 1170.95, subdivision (a) provides.

BAKER, Acting P. J.

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[1] Indeed, if the majority is right that this appeal qualifies as a *direct* appeal, then Penal Code section 1170.95, subdivision (g) applies to *any* appeal; the only real limitation would be that the defendant's conviction must not be final. But that understanding renders the "direct appeal" language in the statute mere surplusage.